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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. [redacted] 42

FARMERS GRAIN COMPANY, a Corporation, et al., (see No. 21)
Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL LODGE NO. 926, et al., and TOLEDO, PEORIA & WESTERN RAILROAD, a Corporation,
Respondents.

PETITION OF PLAINTIFF-SHIPPERS FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 908.

FARMERS GRAIN COMPANY, a Corporation, et al.,
Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL LODGE NO. 926, et al., and TOLEDO, PEORIA & WESTERN RAILROAD, a Corporation,
Respondents.

PETITION OF PLAINTIFF-SHIPPERS FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Farmers Grain Company, a corporation, et al. respectfully shows to this court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition is for a review of a Seventh Circuit Court of Appeals judgment reversing an order of the District Court appointing a receiver to operate the Toledo, Peoria & Western Railroad. The Circuit Court of Appeals held that petitioners-plaintiffs had established a cause of action against the railroad, but that the District Court had awarded them the wrong remedy. The Circuit Court of Appeals after reversing the District Court ordered that a mandatory injunction issue against the railroad ordering it to furnish rail transportation instead of operation by a receiver as an officer of the District Court.

SUMMARY AND STATEMENT.

Suit was commenced in the District Court by 19 plaintiffs for themselves and all others similarly situated. The defendants were the Toledo, Peoria & Western Railroad and 13 Railroad Brotherhoods and some individual union officials.

The suit prays for equitable relief to compel the railroad to fulfill its legal obligations under the Interstate Commerce Act, i. e., to supply rail transportation to plaintiffs and the public. Plaintiffs recommend the appointment of a Receiver as an adequate remedy to achieve the ultimate object of rail service.

On October 1, 1945, the Toledo, Peoria & Western Railroad ceased to operate. This railroad extends through a rich farming country from Effner, Indiana, across Illinois to Keokuk, Iowa. As a result hardship and distress came to many small towns, farming communities and businesses which were totally dependent on it for rail transportation.

The shutdown came when the railroad was returned to its private management after it had been taken over by the government on March 21, 1942.

This railroad corporation with a view to its ownership and management is unique. One person, George P. McNear, Jr., is the only individual who has anything to say about the policies of this railroad. He personally or through a holding company owns practically all of its stock, is its president and a director. The other two directors are his stenographer and trainmaster. One share of stock stands in the name of each, and these certificates at McNear's request have been signed and returned to his possession. As a result he has absolutely controlled all

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labor relations on this railroad and his own particular views on this subject have always prevailed with a resulting history of strife.

This court previously had before it the earlier history of this railroad in Toledo, Peoria & Western Railroad v. Brotherhoods, 321 U. S. 50. In that case, this court considered the early labor difficulties which resulted in a shutdown of this same railroad when a few days after Pearl Harbor and after the unions had postponed a strike, the railroad owner, George P. McNear, Jr., ordered into effect his own rules and working conditions which had been in controversy for some time, and which brought about a strike on December 29, 1941. The evidence in this case contains this and further evidence. Thereafter and during the early part of 1942, the railroad owner continuously refused to arbitrate this dispute. On January 22, 1945, according to the testimony of one of his then employees, McNear stated: "Before I will sign a union contract, I will leave town with what I have got tied in a handkerchief on a stick over my back." McNear denied saying this.

Appeals were made to him by the Director of the Office of Defense Transportation and by the War Labor Board, both of which he rejected. Finally, President Roosevelt himself personally appealed to him to arbitrate the dispute, but McNear rejected his request although the employees had agreed to arbitrate. Finally, by Executive Order dated March 21, 1942 in which there was a finding that there had been "an interruption of transportation of goods essential for the prosecution of the war" the President took over the railroad for the United States "in order to assure successful prosecution of the war".

After the railroad was taken over by the Federal Manager agreements were made with the various classes

of employees. These were substantially the same rates of pay and working conditions in effect on all other railroads in the United States and under them the railroad was operated satisfactorily for 3½ years at a profit of seven million dollars.

On September 6, 1945, the Office of Defense Transportation issued an order terminating government control as of October 1, 1945. By letter of September 13, 1945, the different Brotherhoods representing the men then working on the railroad requested that McNear make agreements with them on the same basis as the Federal Manager had operated. They accordingly requested a meeting on September 19th to discuss the subject. In reply by letter of September 15th, the railroad refused even to meet with them. After this, the employees on September 26, 1945, voted not to continue in service after October 1, 1945. On September 28, 1945, the railroad put into effect its embargo on all shipments over its line effective October 1st. On Saturday, September 29th, McNear by his present attorney sent a letter to the Brotherhood officials containing certain proposals which were rejected as unacceptable. Consequently on October 1, 1946 the railroad shut down with 160 freight cars remaining idle on the sidings.

All efforts to effect a settlement thereafter failed, and 19 shippers who were daily sustaining heavy financial loss and hardship, came to the District Court with the plea that the federal courts afford them relief. After an exhaustive hearing in which 200 witnesses testified the District Court held the shippers and the public were entitled to relief against the railroad and after seeing and hearing the witnesses and with knowledge of the personalities involved together with all the other peculiar facts and circumstances of the case, he decided that the most

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practical and effective way to bring about rail service was by court operation through a receiver.

The Circuit Court of Appeals held that the shippers and the public had proved a cause of action against the railroad. Indeed, the railroad itself in its brief in this court concedes relief should be granted against it. At page 5 it states:

> "... but there can be no denial of the right of the shippers to such relief."

Further on the same page it stated it is unwilling to object to a mandatory injunction against it

> "for the wrong done to the shipping public."

On page 6 the railroad further states that the case involves only

> "The difference of opinion as to which remedy is to be afforded for the paramount right of the shipping public."

It further states at page 8:

> "Respondent shippers have no interest whatsoever in any labor dispute between Petitioners and Respondent Railroad, nor in the terms of any settlement between them."

The only question in issue then, is the form of relief to be granted. It is our contention that the form of remedy to be granted is a discretionary matter with the District Court which the Circuit Court of Appeals should not have set aside in the absence of a showing of abuse of discretion.

The railroad states on page 5 of its brief that

> "experience has shown that complete service can be furnished under the mandatory injunction".

This, of course, is a statement of matters outside this record and occurring after this case had been decided by the Circuit Court of Appeals. No doubt it will be disregarded by this court. However, we do not wish to allow it to stand unchallenged and consequently wish to deny that complete service has been furnished. In our opinion and in the opinion of the District Court, operation by a receiver is the only practical and effective way under the facts and circumstances of this case to restore complete rail service to the public.

OPINIONS BELOW.

The opinion of the District Court appears in 66 F. Supp. 845 and the Circuit Court of Appeals in 158 F. (2d) 109.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, Ch. 229, Section I, 43 Stat. 938 (U. S. C. A., Title 28, §347), providing for review by this Court by certiorari.

THE QUESTIONS PRESENTED.

1. Whether in the exercise of its judicial discretion it was proper for the District Court to remedy an admitted wrong—failure of a railroad to furnish rail transportation as required by the Interstate Commerce Act—through the appointment of a receiver to operate and provide such transportation.

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REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

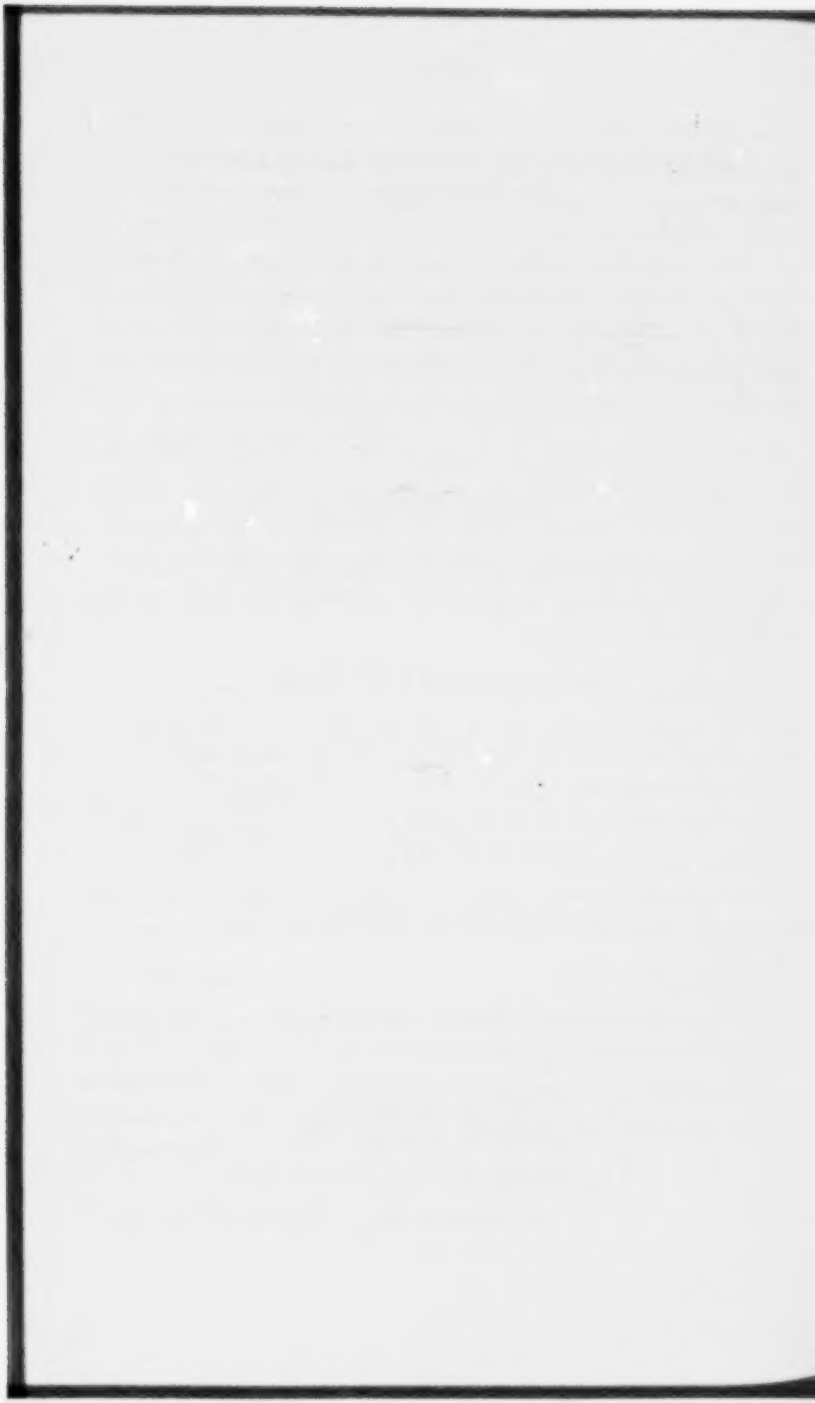
1. The Circuit Court of Appeals rendered a decision which is in conflict with decisions of this and other federal courts in seriously curtailing the inherent power of a court of equity to grant an effective remedy to meet any situation.

2. The Circuit Court of Appeals has rendered a decision in conflict with applicable decisions of this and other federal courts holding that the question of the appointment of a receiver is a discretionary one with the chancellor which will not be set aside unless there is an abuse of discretion.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this court for its review and determination the transcript of record filed therein in this cause below, and that said judgment may be reversed by this court and that the judgment of the District Court may be affirmed.

FARMERS GRAIN COMPANY, a Corporation, et al.,

JOHN E. CASSIDY,
JOHN F. SLOAN, JR.,
By STANLEY W. CRUTCHER,
Attorneys for Petitioner Shippers.



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IN THE

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OCTOBER TERM, 1946.

No. 908.

FARMERS GRAIN COMPANY, a Corporation, et al.,
Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL LODGE NO. 926, et al., and TOLEDO, PEORIA & WESTERN RAILROAD, a Corporation,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The citations of these are: District Court 66 F. Supp. 845; Circuit Court of Appeals 158 F. (2d) 109.

JURISDICTION.

The grounds of invoking this court's jurisdiction are stated in the petition.

STATEMENT OF THE CASE.

A statement appears in the petition which will not be repeated here.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court appointing a receiver to bring about a resumption of rail transportation as guaranteed to the public by the Interstate Commerce Act.

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ARGUMENT.

The Circuit Court of Appeals used practically the whole of its opinion in discussing the railroad's labor policy. It so passed over the real question involved—the rights of plaintiffs and the public—that Judge Major in his dissent stated 158 F. (2d) at page 120:

> "The majority opinion, so I think, places too much stress upon the labor controversy existing between the railroad and its employees and fails to ascribe sufficient importance to the rights of the plaintiffs, the shippers, for whose benefit and on whose behalf the law imposes a positive duty to provide and furnish transportation."

The railroad in its brief in this court in opposition to the unions' petition concedes as pointed out in the Statement that the public has been wronged and that the shippers and others have a right to a remedy against it to restore rail transportation. The case thus narrows down to whether the District Court properly appointed a receiver in this case.

The Circuit Court of Appeals in one short paragraph of two sentences disposed of the question here involved by saying a receiver could not be appointed here because his appointment was not limited as to time and was not ancillary to other relief.

This is a suit in equity guided by the old basic fundamental principles one of which is that equitable remedies are flexible and courts are not restricted by legal formula in granting equitable remedies.

In Union Pacific R. Co. v. Chicago, R. R. & P. R. Co., 163 U. S. 564, this court, speaking through Chief Justice Fuller, stated at p. 601:

> "It must not be forgotten that in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well stated, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party and to the wrong by which that right has been violated' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of progressive social conditions in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly permitted.' Pom., Eq. Jur. 111."

In Alexander v. Hillman, 296 U. S. 222, 80 L. Ed. 192, this court, speaking through Justice Butler, stated at p. 239:

> "Treating their established forms as flexible courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights to all the parties before them."

And in Keystone Driller Co. v. General Excavator Co., 290 U. S. 240, 78 L. Ed. 293, this court again stated as to courts of equity:

> "They are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion."

Furthermore, the extent to which a court of equity will grant or adapt its remedies is guided by the public interest involved.

In U. S. v. Morgan, 307 U. S. 183, 83 L. Ed. 1211, this court, speaking through Justice Stone, stated:

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> "It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved."

In Jay v. City of St. Louis, 138 U. S. 1, 34 L. Ed. 843, this court stated at p. 47:

> "Consideration of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court."

In the present case the District Court was sitting as a court of equity. It found, and the railroad so concedes, that a wrong had been committed against the public by the railroad's failure to furnish rail transportation. The District Judge had listened to and observed over two hundred witnesses. From this he was in a position to obtain a better knowledge than a court of appeal as to what remedy would best function with a view to all of the peculiar personalities and facts and circumstances in the case.

The District Court in its finding of fact (No. 2) stated:

> "The court finds the fact to be that George P. McNear, Jr., has at all times controlled and dominated defendant railroad in all respects."

In Rule 52 of the Rules of Civil Procedure it is stated:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

McNear testified at length in this case. The District Judge had full opportunity to observe him personally to-

gether with all other witnesses. The trial judge had the opportunity to consider the personality and traits of this individual in the light of the peculiar situation on this railroad and the public interest.

This is not a normal railroad corporation. Ordinarily there are various independent directors who operate as checks and balances on the others and upon the officers. In turn the stock is widely held and the opinions and views of many persons enter into the policies of such corporations. If it should occur that the officers or directors in a normal railroad would follow a policy such as here that has resulted in non-operation of the railroad by its officers since 1941, it is not unlikely that the individual or individuals responsible for such a policy would be ousted, and there never would be a situation like that existing in the present case.

This was an element that the District Court had a right to consider in attempting to effectively relieve the hardships of a suffering public. It must have been apparent to the trial judge that as long as McNear with his own peculiar policies had control of the operation of this railroad the public would never get adequate rail service. Consequently the only effective remedy for the public would be to remove the operation of the railroad from his hands. This could only be done by appointing a receiver to take over the operation of the railroad. This in turn would not in any way affect the ownership or title to the properties but at the same time would secure to the public adequate service. The only effect of the receivership would be to oust an individual who the court could only find was incompetent to operate a road of public travel such as a railroad, in which the interests of the public are paramount and to which those of McNear must be subordinated.

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In his written opinion the District Judge points out that a receiver is the only relief that will be adequate. After fully considering everything he stated at page 861:

> "Under these circumstances I see no alternative to the appointment of a receiver."

The Circuit Court of Appeals does not question this finding, but instead lays down as an absolute principle of law that a receiver could never be appointed.

As pointed out above courts of equity are flexible. As stated by this court in Alexander v. Hillman, 296 U. S. 222

> ". . . courts of equity may suit proceedings and remedies to the circumstances of cases . . ."

Consequently when the District Court found that plaintiffs had suffered a wrong which called for a remedy, as a court of equity it could suit its remedy to the circumstances of the case, and use the remedy of a receiver which it found to be the only effective one under the circumstances of this case. The case also had the additional element of involving the public interest which this court stated in U. S. v. Morgan, 307 U. S., would affect it in the "manner of moulding its remedies".

Consequently there was no absolute prohibition against the appointment of a receiver in this case as the Circuit Court of Appeals held.

It is a well settled rule that the question of the appointment of a receiver is one for the discretion of the chancellor and his exercise of such discretion will not be set aside unless it can be said he abused that discretion.

This court in Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339 in considering a request for a receiver stated:

> "Such an application calls for the exercise of judicial discretion."

In the case of Ward v. Central Trust Co., 252 Fed. 127, in hearing an appeal from an order appointing a receiver the Circuit Court of Appeals of the Seventh Circuit stated:

> "Such action on the part of the Court involves the exercise of its discretion depending upon the particular facts and circumstances of each case, and if upon review it does not appear that the court abused its discretion in that regard its action will not be disturbed."

A recent statement of that rule appears in Skirvin v. Mesta, 141 F. (2d) 668 (C. C. A. 10th), page 673:

> "The appointment of a receiver or the refusal to appoint rests in the sound judicial discretion of the trial court, and its action thereon will not be overturned on appeal unless an abuse of discretion is shown."

In Hurwitz v. Hurwitz, 136 F. (2d) 800 (C. of A. D. of C.), in refusing to set aside the appointment of a receiver, the court stated:

> "On this record we cannot say that the lower court abused its discretion in appointing a receiver pendente lite as a conservation measure."

In Kingsport Press v. Brief English System, 54 F. (2d) 497, in ruling on the appointment of a receiver the Circuit Court of Appeals of the Second Circuit stated at page 500:

> "We should not interfere with the exercise of that discretion in the absence of proof of abuse."

In the present case there was no abuse of discretion. In fact the chancellor found that a receivership would be

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the only effective remedy, which finding was not questioned by the Circuit Court of Appeals.

The Circuit Court of Appeals in its opinion cites certain cases of this court as authority for its position that a receiver must always be ancillary to some other relief sought in a suit. Those cases if considered in the light of their respective facts do not lay down any such absolute rule that so restricts a court of equity. In fact as pointed out by the District Court in its opinion this does not appear to be an absolute rule because in many federal cases a receivership was the only relief sought. For example where corporate affairs are so deadlocked by disagreement between stockholders that the corporation cannot function, a receiver as the only relief sought, will be appointed to take over the corporation and operate it until its affairs are so adjusted that it can operate (Saltz v. Saltz Bros., 65 App. D. C. 393, 84 F. [2d] 246). Other examples are cited by the District Court in its opinion.

In the text, Fletcher Cyclopedia of Corporations (Permanent Edition 1932) the author recognizes that some cases lay down as a general rule that a receiver must be ancillary to other relief. He points out the supposed rule is as much breached as observed and when it is recognized courts do not permit it to stand in their way where a receivership is the only adequate remedy in which case they say that such a case is exceptional and the rule therefore does not apply.

In Volume 16 at page 55 the text reads:

> The manner of evading the rule is to say the case is exceptional, or that it is a case of extreme necessity for which there is no other adequate remedy as in case of necessity involving a railroad company or other quasi public corporation or to merely wholly

> disregard and make no reference to the rule or to rely on a statute as changing the rule . . . So decisions that a receiver may be appointed where the corporation ceases to exist or where there are no corporate officers in effect deny this general rule, since in nearly every instance a receiver is the principal relief sought, and the same is true as to decisions holding a receivership proper in case of a deadlock between the officers of stockholders which prevents the carrying on of corporate business.

In the case of Brassey v. New York & N. E. R. Co., 19 Fed. 663, a railroad was placed in receivership on the petition of bondholders although it had not yet defaulted on its obligations and there was no other relief asked except the appointment of a receiver to keep the railroad in operation. It was contended the receivership had to be ancillary to some other relief. In reply to this the court stated at page 609:

> The petitioner's position is that, ordinarily, to justify such an appointment, a case must be pending in which other and principal relief is sought—as to foreclose a mortgage. It is true that in general a receivership is ancillary or incidental to the main purpose of the bill, but it does not follow that where a case is presented which demands the relief which can be best given by a receivership, such relief must be refused, because the time has not arrived when other substantial relief can be asked.

The Circuit Court of Appeals makes reference to the fact that there is no limit of time set for the appointment of the receiver. This, of course, is true in every receivership. In the present case the District Court would have authority to discharge the receiver at any time and would certainly do so when it appeared that the railroad could and would itself furnish adequate rail service to the public.

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CONCLUSION.

It is respectfully submitted a writ of certiorari should issue as prayed.

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Attorneys for Petitioner Shippers.

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IN THE

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OCTOBER TERM, 1946.

No. 1047 42

FARMERS GRAIN COMPANY, A CORPORATION, ET AL.,
Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL LODGE NO. 926, ET AL., AND TOLEDO, PEORIA & WESTERN RAILROAD, A CORPORATION,
Respondents.

BRIEF OF RESPONDENT RAILROAD IN OPPOSITION TO PETITION OF SHIPPERS FOR A WRIT OF CERTIORARI.

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THE SUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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Respondents.

BRIEF OF RESPONDENT RAILROAD IN OPPOSITION TO PETITION OF SHIPPERS FOR A WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals is reported in 158 F. (2d) 109, and the opinion of the District Court is reported in 66 F. Supp. 845.

ADDITIONAL STATEMENT OF THE CASE.

Petitioner Shippers pray that this Court command the Circuit Court of Appeals "to certify and send to this court for its review and determination the transcript of record filed therein in this cause below" (Shippers' Petition and Brief, p. 7). It is difficult to reconcile this prayer with the fact that the transcript of record in this case was certified and forwarded by the Clerk of the Circuit Court of Appeals to the Clerk of this Court long ago.

The important fact appears to be that the record has not been printed or distributed to this Court or counsel in accordance with Supreme Court Rule 38. This Court is therefore unable to determine the accuracy of the innuendoes indulged in throughout Shippers' Petition and Brief. The barrage of personal attacks against Respondent Railroad's president may probably be explained by the fact, as this Court may recall, that two of the attorneys for Petitioner Shippers in this case were counsel for the Brotherhoods in the injunction case heard by this Court three years ago. *Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, et al.* v. *Toledo, Peoria & Western Railroad*, 321 U. S. 50 (1944). That fact was noted by the Circuit Court of Appeals in this case (158 F. (2d) 109, 110-111).

In their petition, Petitioner Shippers adopt the position of Respondent Railroad that the shippers have no interest in any dispute between the Brotherhoods and Respondent Railroad (Shippers' Petition and Brief, p. 5), and in their Brief they criticize the opinion of the Circuit Court of Appeals for overemphasizing the labor controversy (Shippers' Petition and Brief, p. 11). Yet Petitioner Shippers devote most of their attention, in the statement of the case and in

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the argument, to a discussion of their views of that controversy.

Petitioner Shippers correctly state that Respondent Railroad has conceded that the shippers are entitled to relief, and that Respondent Railroad is unwilling to voice any objection to the mandatory injunction directed against it to remedy the wrong done the shipping public (Shippers' Petition and Brief, p. 5). Petitioner Shippers frankly state:

> "The only question in issue then, is the form of relief to be granted." (Shippers' Petition and Brief, p. 5), and
>
> "The case thus narrows down to whether the District Court properly appointed a receiver in this case." (Shippers' Petition and Brief, p. 11.)

The same single issue is clearly set forth as "the question presented" (Shippers' Petition and Brief, p. 6), and Respondent Railroad is in complete agreement with Petitioner Shippers that that is the only issue on this Petition for a Writ of Certiorari.

Under that single issue it does appear, as suggested by Petitioner Shippers, that the details of any labor controversy are quite immaterial. It should be sufficient for the purposes of this case to point out that in 1944 this Court held that Respondent Railroad had made every reasonable effort to settle the dispute by negotiation and mediation. *Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, et al.* v. *Toledo, Peoria & Western Railroad,* 321 U. S. 50, 64. Since that time, as pointed out by the Circuit Court of Appeals in this case, Respondent Railroad has offered to arbitrate before an arbitrator appointed either by the senior federal judge of the district, or by the trial judge, or by the senior circuit judge, or by the Illinois Commerce Commission, or by the National Mediation Board under the terms of the Railway Labor Act, and the Brother-

hoods have rejected all of those arbitration proposals (158 F. (2d) 109, 117).

It is suggested that the only facts material to the issue presented by this Petition are: (1) the interruption of railroad service with the resultant injury to the shippers; (2) the institution of the action by the shippers for relief, with specific prayer for the appointment of a receiver; (3) the appointment of a receiver by the District Court as the ultimate and final relief; (4) the reversal of that decision by the Circuit Court of Appeals on the ground that the appointment of a receiver in this case was improper; and (5) the direction by the Circuit Court of Appeals of a mandatory injunction against Respondent Railroad which has proved to be an effective remedy for restoring transportation service to the shippers.

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ARGUMENT.

I.

The Decision of the Circuit Court of Appeals Is in Full Accord With the Decisions of This Court.

Upon the only issue involved in this Petition, the Circuit Court of Appeals in this case stated:

> "It is clear that the ultimate aim of the action was the appointment of a receiver for the sole purpose of operating the railroad, without any limitation as to time, and not being ancillary to other equitable or legal relief sought. Under these circumstances, we think the decree was improper." (158 F. (2d) 109, 116.)

That decision was required by the line of decisions of this Court which hold that a receivership in such a case is improper and constitutes an abuse of discretion by a court of equity. This Court stated in 1923:

> "Whether the debtor be an individual or a corporation, the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right, nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights." *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497.

In the case of *Gordon, et al.* v. *Washington, et al.*, 295 U. S. 30 (1935), this Court stated at pages 37 and 38:

> "A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself. * * * There is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no

> further disposition. The English Chancery Court from the beginning declined to exercise its jurisdiction for that purpose. * * * Whenever the attempt thus to extend it, by using the receivership as an end instead of a means, has been brought to the attention of this Court, it has pointed out that a federal court of equity will not appoint a receiver where the appointment is not ancillary to some form of final relief which is appropriate for equity to give."

This point was made perfectly clear in 1941 by this Court in the case of *Kelleam, et al.* v. *Maryland Casualty Co., et al.*, 312 U. S. 377, at page 381:

> "This Court has frequently admonished that a federal court of equity should not appoint a receiver where the appointment is not a remedy auxiliary to some primary relief which is sought and which equity may appropriately grant."

These cases constitute a continuous line of authority, and no decision of this Court has been found which expresses a contrary rule. It is respectfully suggested that the decisions of this Court cited by Petitoner Shippers, apparently in support of their belief that the receiver was properly appointed, are hopelessly out of point and have no bearing on the issue in this case. Those decisions, and the decisions of the lower federal courts also cited, are authority for the general propositions that equitable remedies are not inflexible and that the appointment of a receiver generally rests in the sound discretion of the chancellor. Respondent Railroad does not question those principles, but points out that this Court has established a clear limit on the exercise of that discretion, which limit prevents the appointment of a receiver as the sole and final remedy in the case at bar.

Petitioner Shippers rely wholly upon the supposed conflict between decisions of this Court and the decision of the Circuit Court of Appeals in this case, as their reason for

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issuance of the Writ of Certiorari (Shippers' Petition and Brief, p. 7). Since no such conflict exists, but rather the decision of the Circuit Court of Appeals is in full accord with the decisions of this Court on the point involved, Petitioner Shippers have wholly failed to show the existence of any reason for the granting of their petition.

II.

The Receivership Would Be an Inequitable Remedy and Would Violate the Fundamental Rights of the Parties.

Petitioner Shippers state that the only practical and effective remedy for the wrong suffered by them is the appointment of a receiver and that the mandatory injunction will not be effective (Shippers' Petition and Brief, pp. 5, 6, 15).

There can be only two possibilities under which the receivership ordered by the District Court might be more effective in restoring transportation service than the mandatory injunction ordered by the Circuit Court of Appeals. Those two possibilities are either, (1) the receiver would accede to every demand of the Brotherhoods and enter into a contract that is not acceptable to Respondent Railroad, or (2) the Brotherhoods would make some agreement with the receiver that they are unwilling to make with Respondent Railroad because of the personalities involved. Unless one of those conditions prevails, the effectiveness of the receivership and the mandatory injunction, in restoring transportation service, would be precisely the same.

There can be no contention that a refusal to reach a bargain because of the personalities involved is a justifiable position or one that will receive the aid of a court of equity. Even if that position could be supported on any theory, it is at once apparent that operation by a receiver under those

circumstances would continue indefinitely until the managers and owners had been forced to withdraw and had been replaced by other persons acceptable to the Brotherhoods. Such a taking and withholding of property rights to meet the personal whims or desires of the opposite party to a dispute can find no support in the law.

In the only other possible situation, where the receiver would grant all of the Brotherhoods' demands, the inequity of the receivership is no less apparent. The receivership would necessarily continue until Respondent Railroad accepted those same demands. Respondent Railroad would have only two alternatives: it could either make a contract that it was unwilling to make or it could forego the right of managing its properties forever. It is perfectly clear under the decisions of this Court, however, that neither Respondent Railroad nor the Brotherhoods can be compelled to enter into an agreement that is not mutually satisfactory to them. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937); *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1 (1937). The making of an agreement by a receiver, contrary to the desire of Respondent Railroad, to be performed with the funds and the properties of Respondent Railroad, and the continuation of the receivership until that agreement was adopted by Respondent Railroad, would be the clearest kind of compulsion.

III.

The Receivership Would Be Inconsistent With All Current Concepts of Labor-Management Rights and Relations.

The appointment of a receiver for the purpose of settling a labor dispute finds its only precedent in the war-time seizures of plants and facilities under the war powers of the

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executive branch of the government, but there has been and can be no contention that some emergency power justified the judgment of the District Court in this case.

If the receivership were a proper remedy in this case, there would be no labor-management problem today. There would be no occasion for the nation-wide thinking and discussion, and the current congressional committee activities and debate, on such matters as emergency boards, fact finding boards, mediation and conciliation agencies, voluntary or compulsory arbitration, and all of the other old and new methods of avoiding or settling industrial strife. All of those processes are cumbersome, indeed, in comparison with the summary appointment of an equity receiver to effect immediate settlement of a dispute. That cumbersomeness has been accepted by everyone on all sides, however, as a necessary incident in preserving to the parties their fundamental right under the laws of the land—the right to agree or disagree on conditions of employment. Any attempt to alter or destroy those rights by judicial fiat is improper.

If the receivership were a proper remedy in this case, then it would be proper to appoint one or many receivers to force settlement of a labor dispute involving all of the railroads in the country, or involving any or all public utilities. Receiverships would be equally proper to force settlement of a labor dispute involving any basic or important industry, the disruption of which could cause loss or inconvenience to someone, such as coal, steel, automobiles, clothing, food, *et cetera;* because, while such industries do not have the same obligation to render service, they have no greater rights than railroads or public utilities to make their own managerial decisions regarding conditions of employment. The use of an equity receivership to settle a labor dispute, if adopted in this case, can be expected to be utilized in almost any conceivable labor dispute hereafter.

If federal courts of equity are going to pass upon the reasonableness of the business and economic decisions of employers and appoint receivers to make opposite decisions, then there is no reason why we shall not soon be treated to the spectacle of the appointment of a receiver to sell the livestock of a farmer who, in the opinion of some chancellor, is unreasonably withholding his livestock from market.

The only possible distinction between the railroad and the farmer, or any other business, is that the railroad has a statutory obligation to render service. That obligation can be enforced by a mandatory injunction, as ordered by the Circuit Court of Appeals in this case, and there is no more occasion to force the settlement of a labor dispute on a railroad than there is to force the settlement of a dispute in any other business or occupation.

The far-reaching implications of the injection of receiverships into the labor-management picture are truly disturbing.

Conclusion.

The decision of the District Court was in direct conflict with all of the applicable decisions of this Court, was wholly inconsistent with the right of Respondent Railroad to manage its properties, and was properly reversed by the Circuit Court of Appeals. The decision of the Circuit Court of Appeals in this case is in full accord with the applicable decisions of this Court, and there is no necessity for its review.

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

DONALD A. MORGAN,
Attorney for the Respondent,
Toledo, Peoria & Western
Railroad.

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FILED
AUG 20 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 42

FARMERS GRAIN COMPANY, A CORPORATION, ET AL.,
Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL LODGE, NO. 926, ET AL., AND TOLEDO, PEORIA & WESTERN RAILROAD, A CORPORATION,
Respondents.

MOTION OF RESPONDENT, TOLEDO, PEORIA & WESTERN RAILROAD, TO VACATE THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS AND TO REMAND THIS CAUSE TO THE DISTRICT COURT WITH DIRECTIONS TO DISMISS THE SAME AS MOOT AND MEMORANDUM IN SUPPORT THEREOF.

GUY A. GLADSON,
GEORGE W. OTT,
DONALD A. MORGAN,
Attorneys for Respondent, Toledo, Peoria & Western Railroad.

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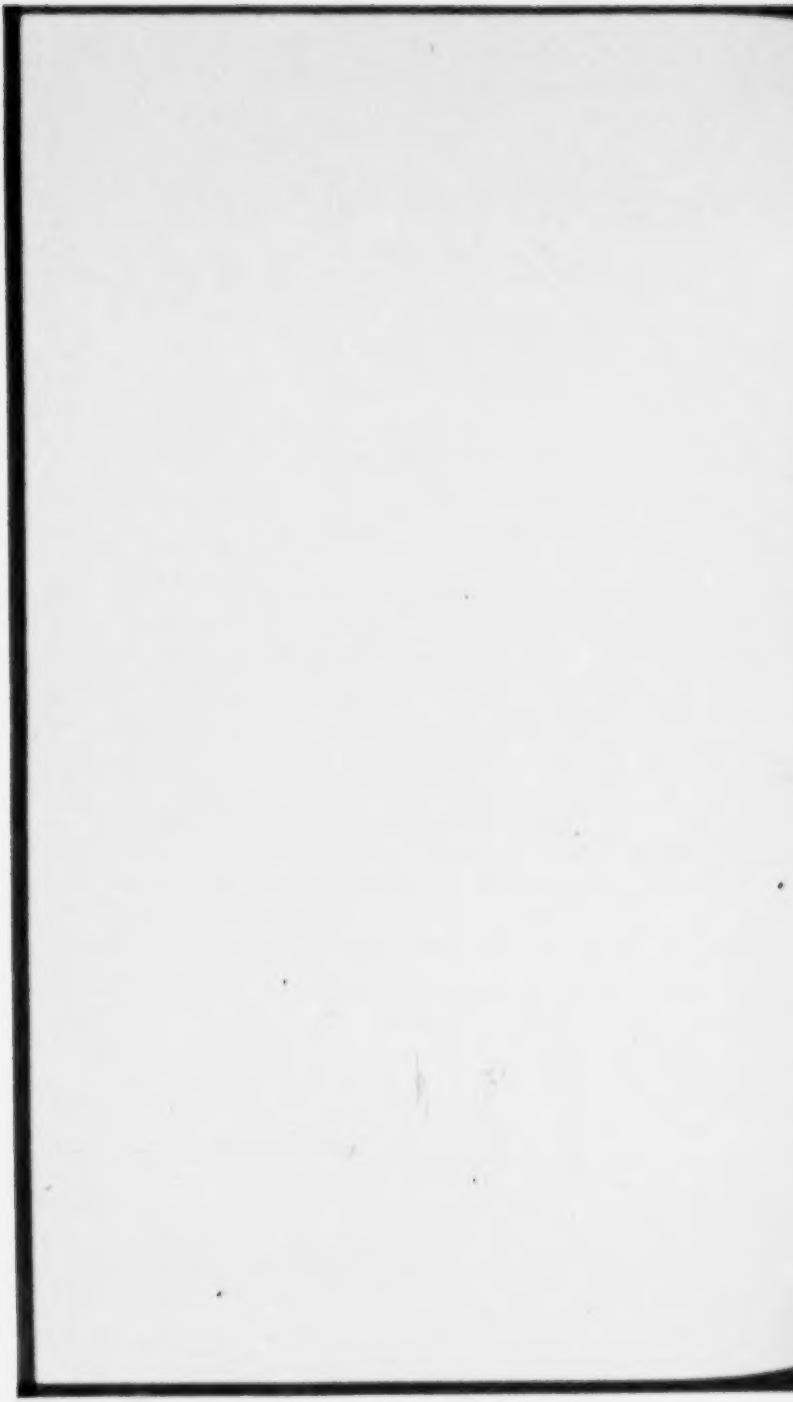

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Respondents.

MOTION.

Now comes TOLEDO, PEORIA & WESTERN RAILROAD, one of the respondents in the above entitled case, by its attorneys, and moves that the judgment of the Circuit Court of Appeals for the Seventh Circuit be vacated and this cause be remanded to the District Court of the United States for the Southern District of Illinois, Northern Division, with directions to dismiss the cause as moot.

In support of its motion, respondent submits the attached Memorandum.

GUY A. GLADSON,
GEORGE W. OTT,
DONALD A. MORGAN,
Attorneys for Respondent Toledo, Peoria & Western Railroad.

MEMORANDUM IN SUPPORT OF MOTION.

On March 31, 1947, this Court granted two petitions for writs of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, which reversed the order of the District Court appointing a receiver for the properties and franchises of the Toledo, Peoria & Western Railroad and remanded the cause with directions to the District Court to issue a mandatory injunction against the Toledo, Peoria & Western Railroad, requiring it to provide transportation service under the protection of a further or ancillary injunction restraining interference with its operations.

One of the petitions for certiorari (No. 1047, October Term, 1946) was filed by the nineteen shippers who had brought their complaint in the District Court against the Toledo, Peoria & Western Railroad (T P & W) and thirteen Railroad Brotherhoods and seven of their officers to compel T P & W to fulfill its obligations under the Interstate Commerce Act to supply transportation to the public, which, it was alleged, T P & W was not furnishing because of a long standing labor dispute with the Brotherhoods. The position taken by the shippers in this Court is that the only effective remedy against the failure of T P & W to provide transportation is the operation of its properties through a receiver and that the substitution by the Circuit Court of Appeals of a mandatory injunction against T P & W for the receivership, which the District Court had decreed, did not afford adequate relief to shippers and the public.

The other petition for certiorari (No. 908, October Term, 1946) was filed by the thirteen Railroad Brotherhoods and seven of their officers, defendants in the District Court, who claimed that eleven of the petitioning Brotherhoods, to-

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gether with the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen, were the designated representatives of all of T P & W's crafts or classes of employees. In their petition and supporting brief, the Brotherhoods urged as grounds for reversal that the injunctional relief which the Court of Appeals directed, violates both the Railway Labor Act and the Norris-La Guardia Act.

Case No. 908 and Case No. 1047, October Term, 1946, have been renumbered October Term, 1947, No. 21 and No. 42, respectively.

• • •

The following statement summarizes the facts essential to an understanding of the controversy which existed between the parties when the complaint was filed in the District Court and at the time the petitions for certiorari were filed in this Court.

On March 22, 1942, the President of the United States, by Executive Order, placed the T P & W under the management of the Office of Defense Transportation. On September 6, 1945, the Director of the Office of Defense Transportation ordered the return of management to the T P & W, effective on September 30, 1945. On September 13, 1945, the Brotherhoods requested T P & W's president to confer with respect to a continuation of the rates of pay and working conditions which had been in effect under Government management. The Brotherhoods and T P & W having failed to reach an agreement, practically all employees who were in the service of the Government during the period of its management withdrew from service on October 1, 1945.

On October 1, 1945, picket lines were set up by the Brotherhoods around the general offices of the T P & W at the Union Station, at the East Peoria Yards, where prac-

tically all of the rolling stock of the T P & W had been collected, and at other points, and were thereafter maintained.

T P & W's efforts to operate the railroad after October 1, 1945 were not successful. Its employees, and those desiring employment with it, were threatened with violence, and clashes between its employees and the armed guards which it employed, on the one side, and the pickets on the other, occurred, in one of which two persons were killed. These troubles grew in intensity. Connecting carriers for a time refused to interchange traffic, and one of them, The Peoria and Pekin Union Railway Company, as late as June 4, 1946, issued an embargo against all shipments to and from the T P & W. By June 1946, T P & W was able to offer only limited service, of carload shipments, not including perishables and livestock, originating at or destined to stations between East Peoria and Effner, Illinois.

On February 20, 1946, the shippers filed their complaint in the District Court. They alleged in substance that as a result of a labor dispute between the Brotherhoods and T P & W, the latter had failed to provide transportation service and had abandoned the operation of its lines, contrary to the Interstate Commerce Act. The prayer of their complaint was for appropriate equitable relief to bring about the prompt resumption of transportation service, including an injunction against T P & W, the Brotherhoods, and all other persons from further abandonment of operation of the railroad, and the appointment of a receiver to take possession of T P & W's properties and franchises and to reestablish its transportation service.

T P & W and the Brotherhoods denied the jurisdiction of the District Court to appoint a receiver and also denied that the railroad could not be placed in operation to perform its duties as a common carrier unless a receiver was

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appointed. In its answer and cross-complaint T P & W denied that it had abandoned its railroad and alleged that it had been unable to operate the same due to the violent acts and unlawful conduct of the Brotherhoods, and that, if given adequate protection, it had available or could procure a sufficient number of employees to operate the railroad and render service to the shippers and to the public at large. By its cross complaint, T P & W sought injunctive relief against the continued violence and unlawful conduct on the part of the Brotherhoods against, or interference with the operation of the railroad.

The District Court heard evidence and, on June 6, 1946, entered its decree. The decree denied the motions of all defendants to dismiss the complaint; dismissed T P & W's cross complaint; appointed a receiver to take possession of T P & W's properties and franchises; and enjoined all persons from interfering with the receiver in the performance of his duties. Its opinion is reported in 66 F. Supp. 845.

On appeal by T P & W to the Court of Appeals, that court reversed the District Court's decree of June 6, 1946. It held that the appointment of a receiver for the sole purpose of operating the railroad, without limitation as to time, and not being ancillary to any other equitable or legal relief sought, was improper; that the shippers were entitled to a mandatory injunction against T P & W to compel it to provide transportation service; that "because of the history of this controversy", T P & W should be protected by an injunction against interference by any one in the operation of its lines; and that T P & W's cross complaint should not have been dismissed. It remanded the case with directions to the District Court to proceed accordingly. The opinion of the Court of Appeals is reported in 158 F. (2d) 845.

It was to obtain a reversal of this judgment of the Court of Appeals that, as stated above, the petitions for certiorari were filed, and on March 31, 1947 were allowed by this Court.

* * *

Since the filing of the petitions for certiorari and answers thereto in this Court, the following events have occurred which render this cause moot:

On March 10, 1947, George P. McNear, Jr., president of T P & W, was killed by a person or persons unknown. During the entire period of the controversy in this case, Mr. McNear was in control of the T P & W and its affairs. His will provided that his estate should be administered by Guy A. Gladson, a member of the law firm of Winston, Strawn & Shaw, of Chicago, and by J. T. Hunter, senior member of the law firm of Hunter, Kavanaugh, McLaughlin & Bond, of Peoria, as executors. It also established a long term trust of his entire estate under which Central Hanover Bank and Trust Company, of New York, New York, The Wilmington Trust Company, of Wilmington, Delaware, and said Guy A. Gladson are trustees. This will was admitted to probate on April 10, 1947 and thereafter a new board of directors and new officers were elected.

After two weeks negotiation between the Brotherhoods and representatives of T P & W, an agreement was reached on April 18, 1947 and, effective at 12:01 A. M. on April 21, 1947, the strike ended and the employees returned to work. By May 7, 1947, formal agreements had been signed by T P & W with each of the thirteen Brotherhoods. Since April 21, 1947, T P & W has been providing full and complete transportation to all shippers and to the public except as to perishables which T P & W was required to ice. This exception was removed on June 4, 1947, when T P & W's ice plant was placed in operation. Since April 21, 1947, except as to perishables which T P & W was required to ice, and since June 7, 1947, as to all commodities, T P & W has been and is now providing full and complete transpor-

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tation service to all shippers.

Upon the settlement of the labor dispute and the restoration of complete transportation service over the lines of the T P & W the foundation of this suit has disappeared. No controversy with respect to any issue in this case now exists among or between the respective litigants. The labor dispute which caused the interruption of service has been amicably settled. All embargoes have been lifted. The T P & W is now and since June 7, 1947, has been fully discharging its obligations to shippers and to the public generally. The conditions which existed when this suit was filed in the District Court and at the time this Court granted the petitions for writs of certiorari and which, in the opinion of the courts below, called for equitable relief, no longer prevail and there is presently no necessity for such relief. The case has become moot.

Accordingly, it is respectfully submitted that under the authority of the applicable decisions of this Court, the judgment of the Circuit Court of Appeals for the Seventh Circuit should be vacated and the cause remanded to the District Court of the United States for the Southern District of Illinois, Northern Division, with directions to dismiss the cause on the ground of mootness. *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *U. S.* v. *Alaska Steamship Co.*, 253 U. S. 113; *Montgomery Ward & Co., Inc. et al.* v. *U. S.*, 326 U. S. 690.

A similar motion and memorandum have been filed in Case No. 21 (No. 908, October Term, 1946).

Respectfully submitted,

GUY A. GLADSON,
GEORGE W. OTT,
DONALD A. MORGAN,
Attorneys for Respondent, Toledo, Peoria & Western Railroad.

OCTOBER 13, 1947.

Per Curiam Decisions.

No. 21. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, LOCAL LODGE No. 926, ET AL. *v.* TOLEDO, PEORIA & WESTERN RAILROAD ET AL.; and

No. 42. FARMERS GRAIN CO. ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, LOCAL LODGE No. 926, ET AL. Certiorari, 330 U. S. 816, to the Circuit Court of Appeals for the Seventh Circuit. *Per Curiam:* The judgment of the Circuit Court of Appeals is vacated and the cases are remanded to the District Court with directions to dismiss the complaint as moot, on motion of the respondent, Toledo, Peoria & Western Railroad, it appearing that counsel for the Brotherhood of Locomotive Firemen and Enginemen et al. agree that the cause is moot. *Louis F. Knoblock, Harold C. Heiss* and *Russell B. Day* for petitioners in No. 21. *John E. Cassidy* for the Farmers Grain Co. et al., petitioners in No. 42 and respondents in No. 21. *Guy A. Gladson, George W. Ott* and *Donald A. Morgan* for the Toledo, P. & W. R. Co., respondent in Nos. 21 and 42. Reported below: 158 F. 2d 109.